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No. 16-8255

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In The
Supreme Court of the United States

ROBERT MCCOY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

BRIEF OF *AMICUS CURIAE* THE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER

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****CAPITAL CASE****

TABLE OF CONTENTS

Page

TABLE OF CONTENTS iii

CONSENT TO FILE AS *AMICUS CURIAE* 1

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. A Criminal Defendant Has the Right to Serve as the Master of His Own Defense 6

II. The Louisiana Supreme Court Egregiously Misunderstood the Ethical Obligations of Counsel 7

A. No defense lawyer is ever ethically required to concede his client's guilt 8

B. By conceding Mr. McCoy's guilt over his objection, Mr. English disregarded his ethical obligations and deprived Mr. McCoy of his right to present his defense 12

III. The Louisiana Supreme Court Erred by Declining To Find Counsel's Conduct Presumptively Prejudicial. 13

A. Mr. English's pursuit of a defense strategy fundamentally incompatible with that selected by Mr. McCoy resulted in the constructive denial of counsel 14

B. Mr. English completely failed to subject the prosecution's case to meaningful adversarial testing 16

C. The Louisiana Supreme Court misapplied this Court's holding in *Florida v. Nixon* 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Bell v. Cone,
535 U.S. 685 (2002) 5, 16, 17

Childress v. Johnson,
103 F.3d 1221 (5th Cir. 1997) 5, 15

Cooke v. State,
977 A.2d 803 (Del. 2009) 19

Faretta v. California,
422 U.S. 806 (1975) .....*passim*

Florida v. Nixon,
543 U.S. 175 (2004) .....*passim*

Haynes v. Cain,
298 F.3d 375 (5th Cir. 2002) 17, 18

Murphy v. Bradshaw,
2008 WL 1753241
(S.D. Ohio Apr. 11, 2008) 19

Nix v. Whiteside,
475 U.S. 157 (1986) 9

People v. Bergerud,
223 P.3d 686 (Col. 2010) (en banc)..... 20

State v. Anaya,
592 A.2d 1142 (N.H. 1991) 20

State v. Carter,
14 P.3d 1138 (Kan. 2000) 12, 13

State v. Harbison,
337 S.E.2d 504 (N.C. 1985) 20

State v. Holmes,
06-2988 (La. 12/2/08), 5 So. 3d 42 17

Steward v. Grace,
Civ. No. 04-3587, 2007 WL 2571448
(E.D. Pa. Aug. 20, 2007) 20

Strickland v. Washington,
466 U.S. 668 (1984) 13

Tuckiar v. The King,
(1934) 52 CLR 335 (Austl.) 11

United States v. Cronic,
466 U.S. 648 (1984) ..... *passim*

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) 6

United States v. Swanson,
943 F.2d 1070 (9th Cir. 1991) 12, 15

United States v. Teague,
953 F.2d 1525 (11th Cir. 1992) 7

Wiley v. Sowders,
647 F.2d 642 (6th Cir. 1981) 15

CONSTITUTIONAL PROVISION

U.S. CONST. amend. VI ..... *passim*

STATUTE

La. Code of Crim. Proc., Article 651 17

RULES

U.S. Sup. Ct. R. 37 1

La. Rules of Prof'l Conduct, r. 1.2 ..... *passim*

La. Rules of Prof'l Conduct, r. 1.4 7

La. Rules of Prof'l Conduct, r. 3.3 ..... *passim*

OTHER AUTHORITY

Bar Standards Board, The Bar Standards Board Handbook (2017) 11

CONSENT TO FILE AS *AMICUS CURIAE*

Pursuant to Rule 37, this brief is filed with the consent of the parties. The brief is submitted by the Ethics Bureau at Yale in support of Petitioner. Letters of consent from both parties to this appeal have been lodged with the Clerk of the Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The Ethics Bureau at Yale[1] is a clinic composed of fourteen law school students supervised by an experienced practicing lawyer, lecturer and ethics teacher. The Bureau has drafted amicus briefs in matters involving lawyer and judicial conduct and ethics; has assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility; and has provided assistance, counsel and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Because this case implicates a lawyer's ethical obligations to obey his client's objectives during the

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[1] The Ethics Bureau at Yale is a student clinic of the Yale Law School. The views expressed herein are not necessarily those of Yale University or Yale Law School. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *Amicus Curiae* has made a monetary contribution to the preparation and submission of this brief.

course of the representation, the Bureau believes it might assist the Court in resolving the important issues presented.

STATEMENT OF FACTS

On May 29, 2008, Robert McCoy was indicted by a Bossier Parish grand jury on three counts of first degree murder. On June 17, 2008, Mr. McCoy entered a plea of not guilty to these charges. On July 1, 2008, the State of Louisiana gave notice of its intent to seek the death penalty against Mr. McCoy.

On March 2, 2010, Mr. McCoy retained Larry English as counsel. Mr. English replaced the court-appointed public defender. Throughout the representation, Mr. McCoy repeatedly and unequivocally told Mr. English that he wished to go to trial to prove his innocence.

Mr. McCoy's clear instructions notwithstanding, two weeks before trial Mr. English informed Mr. McCoy, for the first time, that he planned on conceding Mr. McCoy's guilt to the jury. Mr. McCoy explicitly and vigorously objected to this concession. Mr. English proceeded to concede guilt at trial nonetheless.

In his opening statement, Mr. English readily conceded Mr. McCoy's guilt. During trial, Mr. English failed to call any witnesses to attest to any other view of the facts than those presented by the prosecution. When Mr. McCoy, his own client, took the stand, Mr. English effectively cross-examined him, attempting to reveal inconsistencies in his

testimony. During his closing argument, Mr. English reiterated that Mr. McCoy was the killer in this case and that he, Mr. McCoy's own lawyer, had relieved the State of its burden to prove that fact.

Amicus's interest is in ensuring that a criminal defendant is never executed without having been granted legal representation commensurate with the dictates of the rules of ethics and the Constitution. In this case, only this Court, by granting the writ and reversing the Louisiana Supreme Court, can assure that result.

SUMMARY OF ARGUMENT

A lawyer is required to be his client's faithful agent. This precept is required most crucially in the context of criminal defense, where it is well established that the defendant alone is the "master" of his own defense. This fundamental ordering—defendant as "master" and counsel as "assistant"—is built directly into the Constitution. The Sixth Amendment grants the right to make a defense to the accused personally—not to the state and not to his lawyer. *Faretta v. California*, 422 U.S. 806, 819 (1975). So structured, the Sixth Amendment guarantees the defendant not only the right to retain counsel but also the concomitant rights to choose and even refuse counsel. The Sixth Amendment therefore does not allow an unwanted counsel to be "thrust upon the accused," *Id.* at 820—nor does it permit an unwanted concession of guilt.

The Louisiana Supreme Court grossly misunderstood the nature of the attorney-client

relationship in this case. The court held that the rules of ethics justified Mr. English's decision to concede Mr. McCoy's guilt over his objection in part because the Rules do not oblige a lawyer to put on perjured testimony. *See* Pet.App. A-20. Not so. Nowhere do the rules of ethics suggest that the prospect of false testimony entitles the lawyer to affirmatively disparage his client's case in court against his express wishes.

The decision over whether to concede guilt at trial is ultimately the defendant's to make. It goes to the very heart of the right to put on a defense—a right that personally belongs to the accused. *Faretta*, 422 U.S. at 819. In this case, Mr. McCoy vigorously and repeatedly expressed his desire to assert innocence at trial. Yet Mr. English disregarded those entreaties and readily conceded guilt. By doing so, Mr. English not only betrayed the sacred bond between lawyer and client, but also denied Mr. McCoy his personal right to put on a defense.

Because of the egregious nature of the ethical failures in this case, Mr. English's conduct should be deemed presumptively prejudicial to Mr. McCoy. In *United States v. Cronic*, 466 U.S. 648 (1984), this Court set forth certain circumstances in which a defense lawyer's conduct is considered prejudicial *per se*. Relevant to the facts here are those cases in which "the accused is denied counsel at a critical stage of the trial" and in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. Both occurred here.

Mr. McCoy was constructively denied counsel. By conceding guilt over Mr. McCoy's express objection, Mr. English failed to act within the scope of the attorney-client relationship. He was not, in any meaningful sense, acting as Mr. McCoy's lawyer. Mr. McCoy therefore did not just receive an "incompetent counsel"—he effectively did not receive any counsel "at all." *Childress v. Johnson*, 103 F.3d 1221, 1230 (5th Cir. 1997).

Additionally, Mr. English failed to subject the prosecution's case to meaningful adversarial testing. Indeed, far from testing the prosecution's case, Mr. English seemed downright eager to advance it. He readily conceded Mr. McCoy's guilt in his opening statement; called Mr. McCoy to the stand only to impeach his credibility; and failed to present any evidence that challenged the prosecution's theory of the case. Mr. English's failure to test the prosecution's case thus can only be described as "complete" under *Cronic*. *See Bell v. Cone*, 535 U.S. 685, 696-97 (2002).

Relying on reasoning from the Court's decision in *Florida v. Nixon*, 543 U.S. 175 (2004), the Louisiana Supreme Court declined to find Mr. English's conduct presumptively prejudicial. But *Nixon* only held that a lawyer is not required to obtain affirmative consent from the client before conceding guilt. It expressly did not address the situation presented here, where the client positively objects to conceding. The difference between conceding guilt in the face of a client's non-response and his explicit objection is crucial; for it is the difference between a reasonable strategic decision

based on limited information and total destruction of the attorney-client relationship.

ARGUMENT

I. A Criminal Defendant Has the Right to Serve as the Master of His Own Defense.

The client alone is the master of his defense. This precept finds resonance in the Sixth Amendment, which grants the right to put on a defense directly and personally to the accused—not to his lawyer and not to the state. *Faretta*, 422 U.S. at 819. The Sixth Amendment is so designed because the defendant alone "suffers the consequences if the defense fails." *Id.* at 820. Thus the accused enjoys not only the right to have his defense presented at trial, but also the right to *make the defense himself*, should he so desire.

A defendant's right to be the master of his defense is engaged by the rights to self-representation and choice of counsel. The Sixth Amendment is addressed to the accused; it grants to him personally the right to make a defense. *Id.* at 819. Thus while the Sixth Amendment grants the defendant a right to counsel, it also confers the rights to choose and refuse counsel, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). The rights to self-representation and choice of counsel put the defendant's role as "master" of the defense into sharp relief. Together, these rights confirm that the Sixth Amendment does not allow an unwanted counsel to be "thrust [] upon the accused." *Faretta*,

422 U.S. at 819—nor does it permit an unwanted concession of guilt.

A defendant who accepts the assistance of counsel does not forfeit the right to be the master of his defense. *See Faretta*, 422 U.S. at 819-21; *see also United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) ("[W]hile defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense."). To be sure, counsel may have to make some decisions over the course of a representation without first consulting the client. *See, e.g.*, La. Rules of Prof'l Conduct r. 1.4(a)(2) (requiring only that the lawyer "reasonably consult with the client about the means by which the client's objectives are to be accomplished"). But this practical reality does not in any way disturb the fundamental order of the attorney-client relationship; the Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta*, 422 U.S. at 820.

II. The Louisiana Supreme Court Egregiously Misunderstood the Ethical Obligations of Counsel.

The Louisiana Rules of Professional Conduct, like those of every other state, balance the lawyer's duties to his client with those that he carries as an officer of the courts. Rule 3.3 thus "qualifie[s]" the lawyer's obligations "as an advocate" with a "duty of candor to the tribunal." La. Rules of Prof'l Conduct r. 3.3, cmt. 2. Similarly, Rule 1.2 bars the lawyer from helping his client "engage . . . in conduct that the lawyer knows is criminal or fraudulent." *Id.* at r. 1.2.

The Louisiana Supreme Court maintained that these rules, in part, justified Mr. English's decision to concede Mr. McCoy's guilt over his express objection. Not so. The Rules of Professional Conduct should be read as a unified whole. They do not allow—let alone obligate—the lawyer to abandon his role as the client's faithful agent.

A. No defense lawyer is ever ethically required to concede his client's guilt.

While the Rules of Professional Conduct require counsel to advocate on behalf of his client's interests with zeal, the Rules also recognize that the lawyer carries duties to the tribunals in which he practices as an officer of the courts. A lawyer's "obligation to present the client's case with persuasive force" is thus "qualified" by another important ethical obligation, namely the duty of "candor to the tribunal." La. Rules of Prof'l Conduct r. 3.3, cmt. 2.

The duty of candor to the tribunal prohibits the lawyer from "offer[ing] evidence that [he] knows to be false." *Id.* at r. 3.3(a)(3). The Rules do not preclude the lawyer from offering evidence if he only has a "reasonable belief that evidence is false." *Id.* at r. 3.3, cmt. 8. If the lawyer has such a reasonable belief, however, while not required to refuse to offer the evidence in question, he may nevertheless choose to do so. *Id.* at r. 3.3, cmt. 9.

If the client wants to introduce false evidence, Rule 3.3 instructs the lawyer "to persuade the client

that the evidence should not be offered." *Id.* at r. 3.3, cmt. 6; *see also Nix v. Whiteside*, 475 U.S. 157, 169 (1986). If this strategy should fail and the lawyer-client relationship deteriorate as a result, the lawyer may be required "to seek permission to withdraw." La. Rules of Prof'l Conduct r. 3.3, cmt. 15; *see also Nix*, 475 U.S. at 170. In the event that the lawyer "subsequently come[s]" to realize that he has introduced false evidence that is "material" to the case, he "must take reasonable remedial measures." La. Rules of Prof'l Conduct r. 3.3, cmt. 10. Such remedial measures may include a disclosure regarding the false evidence to the court. *Id.*; *see also Nix*, 475 U.S. at 170. Upon disclosure, it would be for the "tribunal [] to determine what should be done." La. Rules of Prof'l Conduct r. 3.3, cmt. 10.

The instructions provided to the lawyer in Rule 1.2, which prohibit the lawyer from helping the client engage in criminal or fraudulent conduct, parallel those in Rule 3.3. Like Rule 3.3, Rule 1.2 instructs the lawyer first "to consult with the client" regarding the lawyer's duties under the rules of ethics, and, failing that, "to withdraw from the representation" should the client insist on engaging in conduct that the lawyer knows to be criminal or fraudulent. *Id.* at r. 1.2, cmt. 10, 13. In the event that the lawyer comes to "discover[]" that he has assisted the client engage in conduct "that he originally supposed was legally proper," Rule 1.2 requires that the lawyer take remedial steps, which may include "disaffirm[ing]" any fraudulent documents. *Id.* at r. 1.2, cmt. 10.

Neither of these Rules even comes close to suggesting that a lawyer may be allowed to concede his client's guilt over the client's express objection. If the client insists on introducing evidence the lawyer reasonably believes to be false, the most drastic measure the Rules contemplate is withdrawal. Even if the lawyer were to discover that he had offered false evidence—a situation this case does not present—at most the Rules would require him to disclose any "material facts" in "an ex parte proceeding." *Id.* at r. 3.3(d). Simply put, the Rules do not allow a lawyer to sell out his client in court against their wishes. Yet that is the astonishing interpretation of the Rules that Mr. English offered in this case and that the Louisiana Supreme Court accepted:

> "[T]he defendant urged in brief to this court that Mr. English should have advanced his 'unflinchingly maintained claim of innocence,' while Mr. English repeatedly advised the trial court that to do so would run afoul of his ethical obligations. See Louisiana Rules of Professional Conduct, Rule 1.2(d) . . . Given the overarching burden of Mr. English's requirement as an attorney to adhere to Rule 1.2(d), the defendant's repeated assertion that 'the principal has the right throughout the duration of the relationship to control the agent's acts' is unpersuasive."

Pet.App. A-19. True, the Rules provided a basis for Mr. English to refrain from offering any testimony

that he knew or reasonably believed to be false, which could have conceivably included Mr. McCoy's alibi defense. But neither Rule 1.2 nor Rule 3.3 suggest that a lawyer has the authority to make a unilateral decision to concede guilt because he doubts the truth of his client's claim of innocence.

Were the Court to allow such a peculiar reading of the Rules, the ethical landscape of the legal profession in this country would suddenly look starkly different than that in the rest of the common law world. In Australia, for example, it has been settled law for over eighty years that even knowledge of guilt does not relieve a lawyer of his obligation to defend his client and hold the government to its burden of proof. *Tuckiar v. The King* (1934) 52 CLR 335, 346 (Austl.). Similarly, the rules of the bar in England and Wales establish that even a client's confession would not allow the barrister to disclose guilt to the court without the client's consent. *See* Bar Standards Board, *The Bar Standards Board Handbook* gC9-11 (2017). While no such bright-line rule exists in the United States, it is instructive that in other common law jurisdictions a lawyer's duty to represent his client prevails even when that client confesses guilt.

In this case, Mr. McCoy did not confess his guilt to Mr. English—far from it in fact. From the beginning, Mr. McCoy asserted his innocence and vehemently objected to conceding guilt at trial. The fact that Mr. English "became convinced that the evidence against Robert McCoy was overwhelming" did not give rise to any sort of ethical dilemma. Pet.App. A-19. To the contrary, the demands of the

Rules of Professional Conduct were straightforward in this case: no lawyer may concede guilt over his client's objection.

B. By conceding Mr. McCoy's guilt over his objection, Mr. English disregarded his ethical obligations and deprived Mr. McCoy of his right to present his defense.

The decision over whether to concede guilt lies at the very heart of the defendant's right to put on a defense. Although a lawyer may make tactical decisions concerning the means used to pursue his client's objectives, the decision over whether to assert innocence at trial rests with the defendant. For a lawyer to override his client's wishes on such a matter is to "den[y] [him] the right to conduct his defense." *State v. Carter*, 14 P.3d 1138, 1148 (Kan. 2000).

There are few decisions in a trial that run a higher risk of damaging the accused than that of conceding guilt. *Cf. United States v. Swanson*, 943 F.2d 1070, 1075 (9th Cir. 1991). The decision over whether to concede guilt therefore is a fundamental component of the client's right to set the objectives of a representation; it is not a mere question of tactics best left to the lawyer's expertise. A lawyer who fails to abide by his client's decision to pursue an innocence-based defense thus fails to offer a defense that can be said to be his client's defense in any real sense. *Cf. Faretta*, 422 U.S. at 821.

Moreover, a lawyer who concedes his client's guilt against his will violates the spirit, if not the letter, of Rule 1.2(a), which provides that a "lawyer shall abide by the client's decision . . . as to a plea to be entered." La. Rules of Prof'l Conduct, r. 1.2(a); *see also Carter*, 14 P.3d 1138 at 1148 (finding that defense counsel's decision to concede guilt at trial over his client's objection "was [] equivalent to entering a plea of guilty" without his client's consent). It is of no moment whether the lawyer finds his client's desire to prove his innocence persuasive, for the lawyer is obligated to honor his client's wishes to stand trial and hold the government to its burden of proof. *See United States v. Cronic*, 466 U.S. 648, 648, 656-57 n.19 (1984).

In this case, Mr. McCoy repeatedly and unequivocally instructed Mr. English to pursue an innocence-based defense at trial, an instruction that Mr. English deliberately disregarded. By doing so, Mr. English undermined Mr. McCoy's stated objective for the representation and denied him his right to present a defense.

III. The Louisiana Supreme Court Erred by Declining To Find Counsel's Conduct Presumptively Prejudicial.

By allowing Mr. English to concede Mr. McCoy's guilt over his express objection, the trial court deprived Mr. McCoy of the right to be the master of his defense. As a result, Mr. McCoy suffered ineffective assistance of counsel. While *Strickland v. Washington*, 466 U.S. 668 (1984) establishes the ordinary standard for showing

ineffective assistance of counsel—constitutionally deficient performance and prejudice to the defendant—*United States v. Cronic*, 466 U.S. 648 (1984) sets out the exceptional circumstances under which a post-conviction petitioner need not meet the *Strickland* prejudice requirement in order to obtain relief. Specifically, *Cronic* holds that a petitioner is not required to show his lawyer's ineffectiveness actually affected the outcome at trial when the misconduct was so egregious as to be *per se* prejudicial. *See id.* at 659.

Cronic identified two relevant situations in which a lawyer's conduct will be deemed presumptively prejudicial. The first is when the defendant "is denied counsel at a critical stage of the trial," and the second is when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* Both occurred here.

A. Mr. English's pursuit of a defense strategy fundamentally incompatible with that selected by Mr. McCoy resulted in the constructive denial of counsel

Because he lacked a lawyer advocating in support of his plea of "not guilty," Mr. McCoy suffered from a constructive denial of counsel, causing *per se* prejudice under the *Cronic* standard. A constructive denial of counsel occurs when a defendant "must navigate a critical stage of the proceedings against him without the aid of 'an attorney dedicated to the protection of his client's rights under our adversarial system of justice.'"

Childress, 103 F.3d 1221 at 1229 (quoting *United States v. Swanson*, 943 2d 1070, 1075 (9th Cir. 1991)). Where a criminal defendant exercises his constitutional right to plead "not guilty," as Mr. McCoy did, his lawyer has an obligation to "structure the trial of the case around his client's plea." *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir. 1981). This Mr. English failed to do. In denying Mr. McCoy that right to assert innocence in accordance with his plea of not guilty, Mr. English utterly failed to act within the scope of the attorney-client relationship. Mr. McCoy therefore did not just receive an "incompetent counsel"—he effectively did not receive any counsel "at all." *Childress*, 103 F.3d 1221 at 1230.

Moreover, far from advancing his client's expressed interests, Mr. English blatantly defied them. By premising over his explicit objection Mr. McCoy's "defense" on guilt, Mr. English interfered with Mr. McCoy's right to conduct his defense and violated his Sixth Amendment right to counsel. The Rules of Professional Conduct lay "the ultimate authority to determine the purposes to be served by legal representation" with "the client." La. Rules of Prof'l Conduct r. 1.2, cmt. 1. Thus if a client wants to maintain innocence at trial, the lawyer is not entitled to concede guilt, even if he thinks doing so might ultimately "save his life." Pet.App. A-19. Though it may pain him to do so, the lawyer must allow the client to make this momentous choice for himself, "for it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 820.

B. Mr. English completely failed to subject the prosecution's case to meaningful adversarial testing.

Mr. English's conduct during the course of trial clearly matches the Court's description of a lawyer's "complete" failure "to subject the prosecution's case to meaningful adversarial testing," as described in *Cronic* and *Cone*. *Cronic*, 466 U.S. at 659; *Cone*, 535 U.S. at 697. In pleading "not guilty," Mr. McCoy indicated his intention to hold the government to its strict burden of proving guilt beyond a reasonable doubt. Yet, as he would admit in his closing, Mr. English "took that burden" off the government over the course of trial. R. at 3526.

Far from testing the prosecution's case, Mr. English confirmed it, over and over again throughout trial. In his opening statement, Mr. English stated that the "District Attorney can prove its case." R. at 3267. At trial, Mr. English failed to call a single witness other than Mr. McCoy. And when Mr. English did call Mr. McCoy, he only did so to reveal inconsistencies in his claim of an alibi and to impeach his credibility. In essence, Mr. English cross-examined his own client.

Mr. English's apparent purpose was to demonstrate that Mr. McCoy was suffering from a mental defect and thus incapable of forming the crime's requisite specific intent. But this purpose was rendered moot by Louisiana's evidentiary rules. In Louisiana, "[w]hen a defendant is tried upon a plea of 'not guilty'"—as opposed to a plea of "not

guilty and not guilty by reason of insanity"—then "evidence of insanity or mental defect at the time of the offense shall not be admissible." La. Code of Crim. Proc. art. 651.[2] Because Mr. McCoy pleaded "not guilty," any evidence tending to show he was unable to form a specific intent due to insanity would not have been admissible. Mr. English's only attempt to contest the prosecution's case was thus ineffective as a matter of law.

The Sixth Amendment demanded more from Mr. English. *Cronic* and *Cone* do not address a lawyer's mere *attempt* to contest the prosecution's case, but instead conclude that a lawyer is ineffective when he "entirely fails to subject the prosecution's case to *meaningful* adversarial testing." *Cronic*, 466 U.S. at 659 (emphasis added). The word "meaningful" as used in *Cronic* would be rendered meaningless if a mere attempt to introduce inadmissible evidence—evidence that, absent its intended but impermissible purpose, served only to aid the prosecution—were to suffice as "meaningful adversarial testing."[3] Mr. English thus did not

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[2] *See also State v. Holmes*, 06-2988 (La. 12/2/08), 5 So. 3d 42, 74-75 (holding that evidence of defendant's mental incapacity not admissible to show insanity and an inability to form specific intent).

[3] The Fifth Circuit has held that there is not a "complete" failure to subject the prosecution's case to meaningful adversarial testing where counsel meaningfully contests one element of the prosecution's case. *Haynes v. Cain*, 298 F.3d 375, 380-82 (5th Cir. 2002). In *Haynes*, the defendant's lawyer conceded that his client was guilty of kidnapping, rape, and robbery over his objection. The Fifth Circuit declined to find prejudice *per se* because the lawyer nevertheless challenged the state's first-degree murder charges. *See id.* at 381-382. This

subject the prosecution's case to any meaningful adversarial testing, rendering his representation constitutionally deficient under *Cronic*.

C. The Louisiana Supreme Court misapplied this Court's holding in *Florida v. Nixon*.

The Louisiana Supreme Court determined that the facts of this case do not fit any of the situations identified in *Cronic*. Rather, the court determined that Mr. English's decision to concede Mr. McCoy's guilt was reasonable "in light of" of this Court's decision in *Nixon*. Pet.App. A-24. But this case is readily distinguishable from cases such as *Nixon* where the defendant fails to reject the lawyer's proposed strategy of conceding guilt.

In *Nixon*, though the lawyer had repeatedly consulted with his client about conceding guilt at trial, the client never responded to the lawyer's entreaties and neither consented to nor rejected the lawyer's proposed strategy. *See id.* at 181-82. The client's persistent silence in response to his lawyer's numerous attempts to communicate with him about the proposed strategy was material to the *Nixon* Court's holding; the majority focused explicitly and at some length on the importance of this fact. *See id.* at 179, 188-89, 192.

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decision fails in two respects. First, it fails to appreciate the significance of the client's objection to conceding guilt, a fact that resulted in a denial of the client's right to present a defense and a constructive denial of his right to counsel. *See supra* Part II.B, Part III.B. And second, the lawyer in *Haynes* presented a legally and factually available defense for his client, which Mr. English failed to do.

In contrast, Mr. McCoy explicitly and vigorously objected to Mr. English's guilt-based defense from the outset of his trial—a situation this Court declined to address in *Nixon*. This circumstance is significantly more egregious, and runs directly counter to the principle that a client maintains sole authority over the objectives of the representation. *See supra* Part I. The instant case thus presents facts that fall unambiguously outside the reach of *Nixon*'s holding.

When a client explicitly objects to conceding guilt and his lawyer nevertheless proceeds to do so, the Court's narrow holding in *Nixon* hardly forecloses the application of *Cronic*. Decisions by other state courts of last resort and lower federal courts confirm this conclusion. *Cooke v. State*, 977 A.2d 803, 847 (2009), is one such case that bears careful review. There, the Delaware Supreme Court held that *Nixon* does not apply in cases where "the defendant *adamantly objects* to counsel's proposed objective to concede guilt . . . and counsel proceeds with that objective anyway." The *Cooke* court determined that such a "breakdown in the attorney-client relationship" effectively deprives the defendant "of his Sixth Amendment right to make fundamental decisions concerning his case." *Id.* Other courts have similarly suggested that the Louisiana Supreme Court's interpretation of *Nixon* is at odds with the Court's holding in that case, which turned largely on the defendant's failure to object to counsel's strategic decisions. *See, e.g.*, *Murphy v. Bradshaw*, No. 1:03-CV-53, 2008 WL 1753241, at *6 n.6 (S.D. Ohio Apr. 11, 2008) (holding that *Nixon* did not apply "because it is clear that [the

defendant] actively opposed the strategy of conceding" guilt to the jury); *Steward v. Grace*, Civ. No. 04-3587, 2007 WL 2571448, at *8 n.80 (E.D. Pa. Aug. 20, 2007) (noting that *Nixon*'s holding is limited to the situation in which a lawyer consults with his client about conceding guilt and the client is unresponsive); *People v. Bergerud*, 223 P.3d 686, 699 n.11 (Colo. 2010) (holding that counsel cannot concede defendant's guilt to a crime over his express objection and noting that the defendant's "silence" in *Nixon* was "critical" to this Court's ruling in that case).

Furthermore, a significant body of pre-*Nixon* case law strongly suggests that the *Cronic* standard applies when defense counsel concedes guilt without the defendant's consent. *See, e.g.*, *State v. Anaya*, 592 A.2d 1142, 1147 (N.H. 1991) (finding prejudice *per se* where counsel urged jury to convict client of lesser-included offense despite his client's asserted innocence and refusal to plead to that offense); *State v. Harbison*, 337 S.E.2d 504, 507 (N.C. 1985) ("[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed.").

The Louisiana Supreme Court's decision thus stretches this Court's narrow holding in *Nixon* beyond its limits. Far from a meaningless distinction, the difference between a lawyer choosing a course of action in the face of his client's non-response and doing so in direct contravention of that client's clear and explicit demands is the difference between making a reasonable choice based on

limited information and willful disregard of the duties arising from the attorney-client relationship. The Louisiana Supreme Court simply glosses over this crucial distinction to reach a conclusion that is incompatible with this Court's holding in *Nixon* as well as with the decisions of a number of other state and federal courts. It thus leaves similarly situated defendants with dramatically different sets of rights, cries out for Supreme Court review, and should not be allowed to stand.

CONCLUSION

This case demonstrates a complete breakdown in the system of representation meant to secure the fairness of American criminal justice. Mr. McCoy was denied the right to be the master of his own defense. His lawyer conceded and attempted to prove his guilt over Mr. McCoy's insistent and vigorous objection. It would be manifestly unjust for Mr. McCoy to be executed on that account. In Amicus's view, the only proper remedy is a new trial. The administrative costs of that procedure are minimal when compared to the price of sacrificing our constitutional principles and allowing Mr. McCoy to be executed in this case. This Court should grant the writ, allow Mr. McCoy an opportunity to serve as the master of his own defense, and clarify for the country the proper allocation of authority between lawyer and client. Our Constitution requires it.

Amicus respectfully requests that this Court grant the writ of certiorari and vacate Mr. McCoy's conviction and sentence.

Respectfully Submitted,

s/ Lawrence J. Fox

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